CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

The State of Missouri

AT THE

APRIL TERM, 1880.

(*Continued from Volume* 71.)

THE STATE *ex rel.* THE ATTORNEY GENERAL v. COLLIER.

Bribery of the Public by Candidate for Office. It is unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offers is void.

This is a proceeding by writ of *quo warranto* issued on the relation of the attorney general. The information stated that the respondent, Collier, had usurped and intruded into and was unlawfully holding and executing the office of judge of probate in and for Callaway county, and

that he had no right or authority to hold the office; that, at the regular election held in said county for county officers on Tuesday, the 5th day of November, 1878, Middleton G. Singleton and the respondent were candidates for said office of judge of probate, and that said Singleton had, at the time of said election, attained the age of twenty-four years, and had been a male citizen of the United States for five years, was a citizen of the State of Missouri, and has been a resident of said county of Callaway for one year; that said Singleton at said election received 2,154 votes, and respondent received 2,342 votes.

The information further stated that on the 17th day of August, 1878, a public meeting of the citizens of said county was held at the city of Fulton, in said county, at which meeting were present about 1,000 citizens of said county, and at said meeting respondent presented the following resolutions for its adoption, viz:

WHEREAS, Our county is burthened with debt almost beyond our capacity to pay; and

WHEREAS, It has become necessary for every one who is desirous of ridding ourselves of debt, the great destroyer of happiness, it is the duty of every man who is in favor of reducing the enormous and almost unbearable taxation, both county and State; and

WHEREAS, The products of our farm labor have depreciated fifty per cent or more; and

WHEREAS, The salaries of our county officers are larger than we can afford to pay; and

WHEREAS, There are plenty of good men, competent and honest, who are willing to perform the services of the respective offices of the county for the following compensation, viz:

Collector, per year	$1,500
Probate Judge per year, ...	1,200
County Clerk, per year	1,200
Circuit Clerk, per year	1,200

Therefore, be it

Resolved, That we will support no man for the offices mentioned who will not agree to perform the services at the rate fixed in these resolutions.

Resolved, That we most heartily indorse the National democratic platform adopted at St. Louis; also the State democratic platform adopted at Jefferson City in July, and cordially invite all who have the cause of retrenchment and reform at heart to unite with us, and we furtner pledge ourselves to vote for no man to represent our county in the general assembly who does not fully indorse our platform, and who will not pledge his energies and abilities to incorporate the doctrines set forth in these resolutions in the statutes of the State; also to use his every effort to secure the passage of a bill fixing the legal rate of interest at six per cent instead of ten per cent, the present rate.

Resolved, That we will not vote for any man who is not in favor of making notes and bonds and other indebtedness null and void, that are not given in for taxation.

Resolved, That every man who indorses our platform pledge himself to vote for the men that this mass-meeting recommends at the November election: and be it further

Resolved, That we ask our sister counties to join with us in this great work of reform, that we may sweep from place and power the leeches that suck our life's blood. Be it further

Resolved, That king caucus is dead.

The information further stated that said resolutions were adopted by said meeting as a platform on which to nominate and vote for various officers, among others said officer of judge of probate; that said respondent was nominated by said meeting for judge of probate, that respondent accepted said nomination on said platform and canvassed said county for said office on said platform, and in divers public speeches made to the voters of said county during said canvass, said respondent declared and promised that he would perform the duties of said office for $1,200 per annum, and no more, although the salary of said officer

consisted of fees allowed by law, which amounted to the sum of $2,600 per annum; that said respondent, in order to obtain votes for said office, publicly declared to said voters on divers occasions during said canvass, that said fees amounted to the sum of $2,600 per annum, but that he would perform the duties of said office, if elected, for the sum of $1,200 as hereinbefore stated; that said respondent, in order to obtain votes for said office, further declared at divers times and places in said county during said canvass to the voters of said county, that they, by electing himself as judge of probate, and others for other officers named as candidates on the aforesaid platform, would save to the county $5,600 per annum; that respondent caused the aforesaid resolutions or platform, and the fact that he was a candidate for judge of probate thereon to be published in public newspapers in said county from and after said 17th day of August, 1878, to the said 5th day of November, 1878, the day of said election; that respondent further, in order to carry out his corrupt offers as aforesaid and to procure votes for said office, caused tickets to be printed with the following heading thereon: "Low Salary Democratic County Ticket," and caused said tickets to be placed in the hands of said voters at said election, and by said words on said tickets, so printed, did further publish and proclaim to said voters his said corrupt offers with the view of inducing said voters to believe that in voting for him for said office they would reduce the expenses of said county; that all the ballots cast for respondent at said election had said words as aforesaid printed at the head thereof; that more than 200 legal and qualified voters of said county at said election, and who were intending, before the said unlawful and corrupt offers of respondent were made to the voters of said county, to vote for the said M. G. Singleton at said election, were unlawfully and wrongfully induced by said corrupt offers of respondent to change their purpose and vote for said respondent, and relying upon said offers as being lawfully made, and that the same were

legally binding upon respondent, did so change their purpose and vote for respondent for said office at said election, and were influenced and induced so to do solely by reason of said corrupt offers of the respondent, and but for said offers would have voted for said Singleton for said office at said election, and but for said offers said respondent would not have been elected; that respondent, notwithstanding said fraud, intent and corrupt practices as aforesaid, and notwithstanding his said unlawful and corrupt offers to the voters of said county at said election, as aforesaid, had received a commission from the governor of this State as judge of probate in and for said county of Callaway, in this State, under the pretended authority of said election held as aforesaid, and had usurped and intruded into said office and was then executing the same.

The information concluded with a prayer for a judgment of ouster.

Respondent demurred both generally and specially to the information.

J. L. Smith, Attorney-General, for relator.

Boulware, Snell & Flanagan for respondent.

SHERWOOD, C. J.—The legal sufficiency of the information being questioned by the demurrer, requires at our hands an examination into such alleged sufficiency.

Every one will concede that it is of the highest importance that popular elections should be conducted in such a way as to exempt them, so far as the infirmities incident to human agencies will permit, from improper influences. Here the demurrer confesses that being induced by the offers of respondent, to take for his own use only $1,200 out of $2,600, the aggregate fees of the desired office of judge of probate, 200 of the voters and tax payers of the county, who would otherwise have voted for respondent's

rival, changed their purpose and voted for respondent, who but for such offers and their acceptance, would never have been elected. These admissions of the demurrer throw the burden of the assumed lawfulness of his acts upon the shoulders of the respondent. The question arising upon the admitted facts is whether the means employed by him to secure his election were lawful means, means such as this court can sanction, when the respondent, called upon by our writ of *quo warranto* to disclose his title to the office of judge of probate, discloses also that his title must, for its validity, ultimately rest upon the means of whose employment the State in her information complains.

In the recent case of *State ex rel. Newell v. Purdy*, 36 Wis. 213, (*s. c.*, 17 Am. Rep. 485,) the question raised by this information was learnedly and exhaustively discussed, and in such a manner as to leave nothing to be desired, and the conclusion there reached, that means similar to those employed in the present instance were not to be tolerated, and that the title to the office secured thereby would be declared invalid. There the contest was between two individuals as to whom was entitled to the office of county judge, the relator claiming it in consequence of the reception of twenty-three more votes than the incumbent, but the latter claimed, in his answer, that the salary of county judge was fixed at $1,000; that relator being a candidate for the office, published and circulated through the county a promise addressed to the electors thereof, that, if elected county judge, he would perform all the duties and furnish an office, and all other incidentals except the record books, for $600 per annum, during his term, and that solely by this offer 100 voters of the county were induced to vote for relator, thus securing his election. This answer was held sufficient on demurrer.

I am unable to distinguish this case in principle from that one. Here, it is true, the result of the respondent's action, if he complies with his promise, will not be as there, the enriching of the county treasury by refraining from

withdrawing therefrom a sum of money, thereby benefiting pecuniarily each tax payer in the county; but the legal effect of the offer of the respondent is in no wise different; for while he did not propose to enrich the treasury of the county, as in the Wisconsin case, he did propose to impoverish himself, and to benefit every suitor who might come before him in his judicial capacity, by diminishing his lawful fees to less than one-half their usual rate. In other words, he appealed, and the demurrer admits he was successful in that appeal, not to the fair and honest judgment of the voters touching his qualifications and fitness for the office to which he aspired, but to the cheapness with which he would discharge his judicial duties. He said to the voters in effect and with effect: "Elect me probate judge of your county, and no suitor who comes before me shall ever be charged even half the fees which the law allows;" thus making the office which he sought not a matter of qualification but of bargain and sale.

It is not necessary in this case to show, as claimed by counsel for respondent, that he, or those who voted for him, have been guilty of the crime of bribery in its strict sense. In instances like the present; instances involving the freedom and purity of elections, that term possesses a broader significance. As is well said in the case above cited: "It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude or are against public policy." And there the court held that though the answer did not contain allegations of fact showing that the relator or any of the voters of the county had been guilty of the criminal offense of bribery, yet that answer was sufficient, and that acts falling short of that crime in its more restricted and technical meaning would justify the rejection of votes cast for the party made successful by the employment of the unlawful means, and Hawkins Pleas of the Crown is quoted from extensively, and fully supports the position taken, where he says: "Also, bribery sometimes signifies the taking or giving of a reward

for offices of a public nature, and certainly nothing can be more palpably prejudicial to the good of the public than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but those who are the most able to pay for them; nor can anything be a greater discouragement to industry and virtue than to see those places of trust and honor which ought to be the rewards of those who, by their industry and diligence have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion and other acts of injustice than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation." Vol. 1, ch. 27, § 3. Again, the learned author says: "It is of the utmost importance to the public welfare, that in the administration of the government, none but persons competent to perform the duties of their offices should be admitted into any department. But if the sale of offices were allowed to those who have the patronage and appointment, it is evident that there would be the greatest danger of situations being filled not by those whose talents fitted them for the station, but whose purses enable them to obtain it. The sale of offices may, therefore, justly be ranked as an offense against the political economy of the State." Vol. 1, ch. 32, p. 748.

In *Tucker v. Aiken*, 7 N. H. 140, a similar view was taken concerning a practice which had obtained of putting up at public auction and disposing of the office of constable to the highest, and of collector to the lowest bidder; the court there saying, in reference to the custom: "It has a tendency to divert the attention of the electors from the qualifications of the candidates to the terms on which they will consent to serve, and makes the choice turn upon con-

siderations which ought not to have an influence." The doctrine in that case, so far as concerns public officers, met with approval in Massachusetts, the court, in *Alvord v. Collin*, 20 Pick. 428, saying: "We fully recognize the validity of the objection to the sale of offices, whether viewed in a moral, political or legal aspect. It is inconsistent with sound policy. It tends to corruption. It diverts the attention of the electors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practice to procure a remuneration for the price paid. Nor can we discover a difference in principle between the sale of an office for a valuable consideration and the disposing of it to a person who will perform its duties for the lowest compensation. In our opinion the same objection lies against both."

And the legislature of Massachusetts applied the principle now being discussed, in a still more marked manner, in the year 1810. The town of Gloucester, though entitled to six representatives, for economical reasons was accustomed to return but two members, whose pay had by law to be furnished by the town. In that year, however, for political considerations, it was deemed desirable that the entire number of representatives, to which the town was entitled, should be elected; whereupon several individuals with a view to induce the town to elect a full delegation, gave a bond, for the use of the inhabitants, conditioned, that the whole expense of such a representation should not exceed the pay of two members. But it was held by the legislature that the election was void, though none of the members elected from the town had any agency whatever in procuring the execution of the bond. The supreme court of Wisconsin, after citing the above and other authorities, says: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle, is that a vote given for a candi-

date for a public office in consideration of his promise, in case he shall be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county or any other corporation, is void."

We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by respondent differ in no essential particular from the Wisconsin case; the offers in each case are equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application to election cases, is the promise by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since though the suitors who may have to appear before the candidate when judge of probate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same; remain to swerve the voter from his duty as a citizen; to blind his perceptions as to the sole question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known to freemen, the right of suffrage; a right upon whose absolutely free and untrammeled exercise depends the perpetuity of our republican institutions. The transaction of which the State in the present instance complains may have been entered into with laudable motives, but it is, as we think has been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in such cases should be: *obsta principiis*; and it is only by a rigid observance of this by the courts, that the purity of elections can be preserved. The legislature of this State has, as we are informed, at its last session enacted a statutory prohibition against the employment in elections, of agencies such as we have in the preceding pages condemned, thus giving legislative recognition to the principles herein enunciated. [See Rev. Stat.

1879, p. 258, § 1478.—REPORTER.] Holding these views the information will be held sufficient in law, the objection taken thereto by the demurrer not well taken, and the respondent required to plead further. All concur.

MARTIN v. JONES, *et al.*, *Appellants.*

1. **Injunction, Immaterial Irregularity In.** It is no objection to the validity of a decree for a perpetual injunction made upon a final hearing in the circuit court, that a temporary injunction has at the beginning of the case been issued by the clerk of the circuit court in pursuance of an order of the probate court, it appearing that the latter court had jurisdiction to grant temporary injunctions.
2. **Practice.** This court cannot review the action of the trial court in striking out part of defendant's answer, unless the record shows that objection was made and exceptions saved at the proper time, and there is something in the record to identify the part stricken out.
3. **Heirs of party to deed as Witnesses, other party being dead** The children of the grantee in a deed, who by reason of their heirship become plaintiffs in a suit against the legal representatives of the grantor, are not disqualified by the fact that the grantor is dead, from testifying in relation to the execution of the deed. They are not original parties to the cause of action, and hence are not within the restrictions of section 4010, Revised Statutes, in relation to witnesses.
4. **Possession of Land, as Notice of Occupant's Claim of Title.** One who has knowledge of the fact that land is in the actual possession of another, is thereby put upon inquiry as to the rights of the occupant, and if he purchases, will be held to take with notice of those rights.
5. **Equity Jurisdiction**: INJUNCTION: DEED OF TRUST. Equity will interfere by injunction in favor of one claiming title to land through an unrecorded deed, to prevent a sale under a deed of trust held by one who took it with notice of the plaintiff's claim.

Appeal from Carroll Circuit Court—HON. E. J. BROADDUS, Judge.

AFFIRMED.

Hale & Eads for appellants.

L. H. Waters for respondent.

NAPTON, J.—The pleadings in this case and the principal facts in controversy are stated in the opinion of this court in 59 Mo. 181. The only point upon which the judgment for plaintiff was then reversed does not arise in the present case.

1. INJUNCTION, IMMATERIAL IRREGULARITY IN.

The points now relied on are, first, that the original injunction issued under the orders of the probate court of Carroll county, a court conceded to have the power to issue injunctions, was void for the reason that the clerk of the circuit court was ordered to issue the writ. This objection is obviously of no force, since the proceedings from which the appeal is taken, occurred in the circuit court and the initiatory steps are unimportant.

2. PRACTICE.

The second objection urged is, that a part of defendant's answer was stricken out, as immaterial. The bill of exceptions in the case does not show any objections to this action of the court, or any exceptions taken to it, nor does the record proper show what part of the answer was stricken out, as it is only described as that part included in brackets, and the record before us contains no brackets in the copy of the answer. *Pearce v. McIntyre*, 29 Mo. 423.

2. HEIRS OF PARTY TO DEED AS WITNESS, OTHER PARTY BEING DEAD.

The next point suggested by the appellants is, that Mrs. Glover and her brothers, children of Williams, the grantor in the alleged deed from McCarty, and, since the death of their father, plaintiffs in the action, were incompetent witnesses to prove the execution of the deed, and, therefore, the objection to their admission on the trial should have been sustained. The objection is based upon that provision of our statute which renders incompetent one of the original parties to the contract or cause of action, where the other

party to such contract or cause of action is dead. In this case the witnesses objected to were not parties to the contract or deed, and were unquestionably competent to prove the execution of the deed, which was the ground-work of the action, at the first trial, when McCarty was living. Has the death of McCarty since rendered them incompetent? We think not, because they were not parties to the contract, and do not, therefore, come within the letter or reason of the statute. McCarty and Williams were the original parties to the contract; both are since dead. The children of Williams are not disqualified from testifying because of the death of their father, or McCarty, or both. The statute was designed to exclude the testimony of one party to a contract when the mouth of the other was closed by death. Here both the original parties to the contract are dead, and the witnesses offered are not disqualified because by the death of their father they have become parties to the action. They occupy the same position as any other plaintiff would, and the statute concerning parties to the contract or cause of action has really no application to the case.

The testimony of Mrs. Glover and young Williams was really unimportant, except in corroboration of what was clearly proved by the notary, Whiteman. He proved that Williams brought the deed offered in evidence from McCarty to Williams, to him to have it acknowledged and signed by McCarty's wife, and the notary showed the deed to McCarty, who admitted that he had signed it, but declined doing anything further because his wife objected to it.

4. POSSESSION OF LAND, AS NOTICE OF OCCUPANT'S TITLE.

Another point made in this case is, that there was no proof of notice on the part of Austin, the beneficiary in the deed of trust of the previous conveyance to Williams by McCarty. This was alleged in the petition and denied in the answer. I doubt whether such allegation was necessary, since Austin was not a purchaser for value, in the sense in which such

phrase is used in regard to questions of notice, but merely the *cestui que trust* in a conveyance made to secure a previous indebtedness on the part of the debtor.

But conceding such notice to be necessary, the proof was clear that he knew of the possession and improvement of from twelve to fifteen acres of this twenty acre tract by Williams nearly a year before he took his deed of trust on it. Although, doubtless, seeing one in possession of a tract of land and fencing it up and cultivating it does not necessarily imply that he is the owner or claims to be the owner, it certainly does put a man upon inquiry when he proposes to acquire a title to such land.

It is urged finally in this case, that supposing Williams' title to be established, it was a legal one, and if Aus-

5. EQUITY JURISDICTION: injunction: deed of trust.

tin had notice, which the circuit court found upon the evidence that he had, then a sale under the deed of trust would convey no title to the purchaser, and, therefore, there was no necessity for any interference of a court of equity by injunction. But it is obvious that the condition of the purchaser at the trustee's sale would be very different from that of the present defendant, and might create embarrassing questions. The deed to Williams was not acknowledged or recorded, and a *bona fide* purchaser at the sale without notice would have very different claims from that of the present defendant. Besides, the contingencies of death of the witnesses might render proof of the conveyance established in this case impracticable. It is one of the peculiar branches of equitable jurisdiction to anticipate such difficulties, to prevent future litigation and thus remove a cloud upon the title. *Vogler v. Montgomery*, 54 Mo. 577; *Harrington v. Utterback*, 57 Mo. 519. The judgment is affirmed. All the judges concur.

BLANDY *et al.*, *Appellants*, v. ASHER.

1. **Divorce, as Affecting Wife's Homestead Rights.** Divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's land, where she continues to reside upon it with her minor children. HOUGH and HENRY, JJ., dissenting.
2. **Abandonment by Husband of his Family, as Affecting Question of Homestead.** In the absence of evidence that a man who has abandoned his wife and children and has suffered a divorce from his wife, has since acquired a homestead elsewhere, a place which was his homestead at the time of the abandonment and continues to be the residence of his children and their mother, will still, for the purpose of preserving the rights of the children, be treated as his homestead.
3. **Homestead**: EJECTMENT. A defendant in ejectment cannot claim under the homestead act land exceeding in value the statutory limit.

Appeal from Gentry Circuit Court.—HON. S. A. RICHARDSON, Judge.

REVERSED.

Ejectment. Plaintiffs claimed through a sale under execution against Lewis Asher. The defendant, who was formerly the wife of said Lewis, but had obtained a divorce from him, claimed under the homestead act.

Geo. W. Lewis, *Wm. Hubbard*, *Bennett Pike* and *Vinton Pike* for appellants.

Lay & Belch, *with Goodman*, *Collins & Howell* for respondents.

SHERWOOD, C. J.—The questions presented by the record are: 1st, Was the right acquired by the wife by reason of her filing her statutory claim to the homestead, lost in consequence of the divorce she subsequently obtained? 2nd, Even if such right was defeated and determined as to the wife, by the judgment which dissolved the marital

relations existing between the parties, does such overthrow as to the wife's right in the premises, entitle plaintiffs to be successful in this action? These questions will be considered in the order presented.

1. DIVORCE, AS AFFECTING WIFE'S HOMESTEAD RIGHTS.

No one can read with any degree of attention the provisions of our homestead act without reaching the same conclusion arrived at by most courts in construing similar legislative enactments, that such provisions were designed to mark out a course of enlightened public policy, whereby each family might secure a shelter, a place of refuge, against the storms of financial misfortune, which the greatest amount of human prudence and sagacity cannot always avert. Taking such a view, courts, for the most part, have held that these homestead laws, being of a liberal and beneficent nature, being designed to prevent pauperism and vagrancy and their consequent temptations to crime, should not be dwarfed, and their evident purpose thwarted by a narrow and illiberal construction. Thompson on Homesteads, § 1, *et seq.*, and cases cited. Such statutory exemptions respecting land, are not in derogation of common law, and consequently, not to be strictly construed, because the whole matter of the sale of real estate under *fi. fa.*, likewise its exemption from such sale, is of purely statutory origin and regulation. Ib., §§ 2, 3 and 4.

The law under which Alice Asher filed her claim, is as follows: "The homestead of every housekeeper, or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith, * * shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided, * * and any married woman may file her claim to the tract or lot of land occupied or claimed by her and her husband, or by her, if abandoned by her husband, as her homestead; said claim shall set forth the tract or lot claimed, that she is the wife of the person in whose name the said tract or lot appears of rec-

ord, and said claim shall be acknowledged by her before some officer authorized to take proof or acknowledgment of instruments of writing affecting real estate, and be filed in the recorder's office, and it shall be the duty of the recorder to receive and record the same. After the filing of such claims, duly acknowledged, the husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever. Every such sale, mortgage or alienation is hereby declared null and void, and the filing of any such claims as aforesaid with the recorder shall impart notice to all persons of the contents," etc. This law was approved and took effect March 24th, 1873. Acts 1873, p. 16, § 1; R. S., § 2689.

The judgment upon which plaintiffs rely, was rendered against Lewis Asher March 12th, 1873, the execution issued and levied two days thereafter, and the sale occurred September 1st of that year. Prior to that sale, August 23rd, 1873, the then wife had filed her claim to the homestead. She obtained a judgment of divorce at the September term, 1875. Lewis Asher, her husband, left her August 11th, 1872, and returned but once, and that was about three years before the trial of this cause, at the September term, 1876. The place claimed by Alice Asher had been occupied and resided on by herself, husband and family of children, as a home, from 1864 up to the time he left; and since that time she and her minor children had continued thus to reside on and occupy it; and she was in fact, if not in law, the head of the family.

The above being, then, the facts in this case, the question proposed at the outset recurs: Did the wife by the exercise of her statutory right to obtain a divorce, lose her previously acquired statutory right to her homestead? In the *State v. Pitts*, 51 Mo. 133, it was said: "The legislature in the provisions of the law respecting homesteads uses the broadest language and exempts from attachment and execution, the homestead in all cases, except as therein provided." And so it was held in that case, that though

in general the State is not within the purview of a statute unless specially named, yet that, as no reservation was made in the homestead act in favor of the State, the homestead of the defendant could not be sold under an execution issued in the name of the State on a forfeited recognizance. Neither in instances like the present does the homestead act make any reservation in favor of a creditor as against the homestead of a wife, who, abandoned by her husband, files her claim and secures her homestead, because of the very fact of such abandonment.

It is to be observed, that while the statute under consideration is careful to provide a way whereby a woman, abandoned by her husband, may gain a homestead, that statute nowhere provides any means whereby the homestead thus gained shall be forfeited and lost. And who shall gainsay the statute? The rule of the statute is the exemption of the homestead; and that exemption prevails, "except as therein provided." *State v. Pitts, supra.* By the express terms of the statute, after the wife's claim is filed, the husband is "debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever; and every such sale, mortgage or alienation is hereby declared null and void." And the only exception to the entire inalienability of the wife's homestead, thus acquired, is that provided by a subsequent clause of the same section, where, by her own voluntary act, she may join with her husband in conveying such homestead. Under a somewhat similar statute in Illinois, where the amendatory act of 1857 prohibited alienation by the husband without the concurrence of the wife, it was held that the statute created a homestead exemption in her, as against the creditors of the husband and his alienees. *Turner v. Bennett* 70 Ill. 263.

But it is said that the section above quoted "is designed for the benefit of abandoned wives, not divorced wives." This position, though plausible and ingenious, is untenable; and it is untenable for this reason, if no other;

It would require an interpolation of the statute with words to this effect: *Provided*, however, that whenever the wife, thus abandoned, shall obtain a divorce because of such abandonment, she and her minor children may be forthwith ejected from the homestead, acquired as aforesaid, by any creditor who theretofore may have sold such homestead under execution issued against her former husband. I know of no authority, and possess no inclination to thus judicially legislate. And yet it is only by means of such judicial legislation that plaintiffs' position can be upheld, for the statute, as it stands, uses no such language as that used by way of illustration, nor any expression from which a similar meaning can reasonably be inferred. And it would be strange indeed if the law were otherwise than I have stated; strange indeed, that the legislature should so sedulously, should with such emphatic language prohibit the husband from disposing of the homestead, and yet permit the deserted wife, divorced because deserted, and her helpless little ones, to be ruthlessly expelled, at the instance of some rapacious creditor, from the very shelter that the law said should be hers, upon the filing of her claim for that purpose. Surely, a law conducing to such harsh results, would possess no single attribute entitling it to be called "liberal, wise and benevolent," "beneficent" or "humane in its character," or as one "especially designed to guard the wife and children against the neglect, the misfortunes and improvidence of the father and husband." *State ex rel. Meinzer v. Direling*, 66 Mo. 375, and cases cited.

The reason of the law is said to be the life of the law. If the homestead act is especially designed for the protection of the wife and children, how does the reason for their protection cease, because the wife is separated from her husband by divorce instead of by death? And how is the necessity for that protection diminished, because the fact of abandonment gives simultaneous origin to the right of homestead and the right of divorce? The same law which gives the deserted wife the right of homestead, confers on

the widow a similar right. But I suppose it would scarcely be contended that a widow who should re-marry, would thereby cease to be the widow of the decedent within the meaning of the homestead act, and consequently disenabled to continue to hold her homestead in that capacity. And still, such contention would very closely resemble the distinction attempted to be drawn here, between an abandoned wife and a divorced wife. The statute recognizes no such distinction, and every consideration of sound reason, as well as the contemplation of the purpose and policy of the statute forbid that it be entertained.

I concede that the 1st section of the amendatory act of 1873, above quoted, does not say that on the filing of the wife's claim the homestead shall "pass to and vest in" the wife, as does the 5th section of the original act in regard to the widow, but language tantamount to that, in its practical effect as against the husband, his alienees and creditors, is employed (*Turner v. Bennett*, *supra*), language much broader than that of the Illinois statute, language which confers on the abandoned wife the affirmative right of making claim for a homestead, and then, after the claim is made and the homestead is secured, exempts that homestead from "attachment and execution," and pointedly prohibits its alienation "in any manner whatever" by the husband.

I have been able to find no adjudicated case precisely like this one in all its features, but have found two, which in principle, support the views here expressed. In *Sellon v. Reed*, 5 Biss. 125, a wife in the possession of premises as her home, filed her bill for and obtained a divorce from her husband, the decree awarding to her the custody of her minor children, as well as alimony. The only defense set up to the ejectment brought by the alienee of the husband, was a right of possession under the homestead act, and such defense was held good, Blodgett, J., remarking: "Following the spirit of the adjudications, so far as made by the courts of this State, I think the defense set up is

made out by the facts. The principle of those decisions seems to be that the homestead estate is carved out of the general estate, and vested in the head of the family. The wife cannot be divested of her homestead right without a deed solemnly executed and acknowledged by her in the manner pointed out by the statute. In this case the wife acquired her homestead right in the property, and, at the time the divorce was applied for, was living thereon as her home. By the decree of divorce she is charged with the custody and care of the child, and thus continued as the head of the family." The learned judge then proceeded to quote from *Van Zant v. Van Zant*, 23 Ill. 536, where the supreme court of Illinois, (although in a case not requiring the point to be decided, as the wife was held otherwise entitled to the premises,) said: "The intention of the act is manifestly to save the homestead for the family, and there is the same necessity for a home when the householder is living as when he is dead, hence the right to this homestead not having been released by Van Zant, inures to his family. The question now arises, did the divorce of the wife destroy this right? The natural death of the householder would not destroy it, nor would his civil death for c ime. If this was not so, the object of the act would be defeated and the beneficence of the legislature of no avail. The wife was the meritorious cause of the divorce, the children composing the family were committed to her care and nurture, and have, in our judgment, an undoubted right to occupy the homestead. As a home, and as their home, it has never been granted away, or the right to occupy it released or waived by any one competent to release or waive it. The spirit and policy of the homestead act seems to demand this concession, and to regard the complainant, for this purpose, as a widow and the head of the family."

In *Bonnell v. Smith*, 53 Ill. 375, it was held that where the wife of a party having a homestead right, obtained a divorce from him, she being the meritorious cause thereof,

and the custody of their child being committed to her, she became the head of the family, and the homestead right passed to her as such by operation of the statute, and could not be defeated by sale under execution occurring subsequently to the divorce, but issued on a judgment rendered prior to the divorce.

I am unable to distinguish this case in point of principle from those I have just cited. It is true that in the present instance it does not appear that the children were awarded by the judgment of divorce to the custody of their mother, but I cannot regard this as materially affecting her homestead right. She was, to all intents and purposes in fact, if not in law, the head of the family, and entitled to all the benign protection which the homestead act was designed to confer.

Guided by the foregoing reasons and authorities, I am of the opinion that the divorce of the wife did not alter her status so far as concerns her homestead right; that by filing her claim, that right became fixed and absolute, as against her husband and his creditors; a right which neither the decree of divorce, nor a judicial sale could alter, take away or lessen. And it may be remarked in conclusion of the point in hand, that I should take the same view, whether I construed the statute in question liberally or otherwise. A liberal construction would certainly tend to the conclusion announced, but if it be true that the creditor, as well as the debtor, has no rights under the execution laws, except those conferred by those laws, then the same result will attend, at least so far as concerns the present case, a strict as well as a liberal construction of them.

2. ABANDONMENT BY HUSBAND OF HIS FAMILY, AS AFFECTING QUESTION OF HOMESTEAD.

But conceding that there is a distinction to be taken between a wife abandoned and a wife divorced; conceding that the divorce accomplished all that plaintiffs claim it did, are they, upon the evidence adduced, bettered by such concessions? I think not, and for these reasons: It does not appear that

Lewis Asher had ever gained another homestead. Now, if a residence be gained, it is presumed to continue until a new one is gained, (*Cadwalader v. Howell*, 18 N. J. L. 138;) and so of a homestead. Mr. Thompson says; "It has frequently been decided that the act of desertion by the husband cannot have the effect of changing the home of either the husband or his deserted family." Thompson on Homesteads, § 277, and cases cited. This was the ruling in *Moore v. Dunning*, 29 Ill. 135, Caton, C. J., remarking: "The only question, therefore, is, whether the desertion by the husband, leaving his family still occupying the homestead, was an abandonment of it as a homestead. To this there can be but one answer, which is in the negative. This place still continued the home and residence of the husband as well as his family, at least until it is proved that he acquired a home and settlement elsewhere, and this the law can never assume he has done. The presumption is that he continues a wanderer without a home, until he returns to his duty and his family." This ruling was followed in *White v. Clark*, 36 Ill. 285, where ejectment was brought against the wife, and she had not relinquished her homestead right, and it was ruled that the execution sale passed nothing, and upon these facts appearing, a *prima facie* case was made out, and the burden was on plaintiff to show that his case fell within some of the exceptions of the statute.

So that it will be observed that even if the decree of divorce accomplished all that plaintiffs claim it did, even if it defeated or overthrew the wife's right, and made her a mere trespasser and unwelcome intruder in her former home, still plaintiffs' case is not bettered thereby, because if that was the effect of the decree of divorce, a statement which I deny, inasmuch as no new homestead appears to have been gained by the husband, his old one will be presumed to continue, in which event, plaintiffs certainly could not eject the children of the husband and father, Lewis Asher, without making him a party defendant to the ac-

tion, as he, then, would be the head of the family, and his rights could not be affected unless thus made a party.

Notwithstanding the conclusions already announced, the judgment must be reversed, because the testimony showed that the land claimed by Alice Asher exceeded in value the statutory limit, and the declaration of law given on her behalf ignored the question of value. Judgment reversed and cause remanded. NAPTON and NORTON, JJ., concur; HOUGH and HENRY, JJ., are not of opinion that the former wife is entitled to a homestead.

3. HOMESTEAD: ejectment.

HOUGH, J., DISSENTING.—In Illinois, and perhaps elsewhere, it is provided by statute that the court which grants a divorce shall dispose of the homestead estate according to the equities of the case. Acts of Ill. 1871–2, p. 478, § 5. No court in this State is invested with any such authority. Our homestead act provides for the wife, and continues in her, in the event she should become a widow, the right so acquired and held by her as wife. But it makes no provision whatever for women who have been divorced. *Brown v. Brown*, 68 Mo. 396. It is said, however, in the opinion of the majority, that the statute makes no distinction between an "abandoned wife" and a "divorced wife." There is no such person known to the law as a "divorced wife." The phrase is a solecism. When a woman is divorced, she is no longer a wife, and cannot be the widow of the person from whom she is divorced. *Dobson v. Butler*, 17 Mo. 87. Such a person, therefore, cannot claim the benefit of the provisions made by the homestead law for wives and widows.

The position is also impliedly assumed, that as the statute gave Mrs. Asher a right to a homestead, and also gave her a right to a divorce, the exercise of her statutory right to obtain a divorce could not divest her of her statutory right to a homestead. As well might it be said that as the statute gives the wife a right to a homestead, and a

right also to join her husband in conveying it away, the exercise of her statutory right to convey will not destroy her statutory right to the homestead. The consequence of the exercise of a statutory right must, of course, depend upon the nature and legal effect of the right exercised. A strange condition of things would ensue under the ruling of the majority, if Lewis Asher, having a right to the custody of his children, should marry again and claim the homestead. I am of the opinion that the right of Alice Asher to a homestead ceased when she ceased to be the wife of Louis Asher. HENRY, J. concurs.

THE STATE v. STARK, *Appellant.*

1. **Practice, Criminal**: ASSISTANT TO PROSECUTING ATTORNEY. It is not error to permit an attorney assisting the State's attorney in the prosecution of a criminal case to make the opening statement to the jury. R. S., § 1908.

2. ——: ——. Certain remarks made by the prosecuting attorney in his closing address to the jury. *Held*, not to have been of such a character as to prejudice the defendant, or call for a reversal of the judgment.

3. ——: CONDUCT OF JURORS AND BAILIFF IN CHARGE OF JURY. While it is improper for a juror in a criminal case to ask advice of the officer in charge of the jury in relation to the case, and equally improper for the officer to communicate such inquiry to the prosecuting attorney, yet if the officer made no response to the juror, and it is shown that the defendant was not in any way prejudiced, such inquiry of the officer and communication by him to the prosecuting attorney will furnish no ground for setting aside a conviction.

4. ——: EVIDENCE ON THREATS. In the absence of evidence of conspiracy between father and son, antecedent threats made by the son against the life of the defendant are not admissible in evidence on behalf of the defendant upon the trial of an indictment for an assault upon the father.

5. ALLOCUTION OF THE JUDGE IN CASES NOT CAPITAL. On a conviction of an offense not capital, the omission to enter of record the allocution, or formal address of the judge to the prisoner asking him if he has anything to say why sentence should not be pronounced

against him, is not an error for which the judgment should be reversed.

Appeal from Bates Circuit Court.—HON. F. P. WRIGHT, Judge.

AFFIRMED.

Smith & Abernathy for appellant.

J. L. Smith, Attorney-General, and *Chas. Forbes*, Prosecuting Attorney, for the State.

HENRY, J.—The defendant was indicted for an assault upon William Webb with intent to kill. At the March term, 1880, of the Bates circuit court, he was tried, found guilty and sentenced to two years imprisonment in the penitentiary. He appealed from the judgment, and the points relied upon for a reversal will be noticed in the order in which they are made in the brief of his counsel.

Mr. C. C. Bassett, an attorney at law, was employed to assist the prosecuting attorney, and made the statement of the case to the jury. Because section 1908, Revised Statutes, prescribing the order of trial, provides that "the jury being empaneled and sworn, the trial may proceed in the following order: First, the prosecuting attorney must state the case," etc., it is contended that it was error to permit that statement to be made by the attorney employed to assist the prosecuting attorney. In the *State v. Hays*, 23 Mo. 287, it was decided that an attorney might be employed to assist the State's attorney in the prosecution. If an assistant may be employed, it follows that he may occupy any position in the trial of the cause assigned him by the prosecuting attorney. He is, as to the trial of the cause in which he is so employed, a prosecuting attorney.

1. PRACTICE, CRIMINAL: assistant to prosecuting attorney.

Appellant also complains that the court erred in permitting the prosecuting attorney to make statement of facts to the jury which were not proved.

2. ——: ——.

Mr. Bassett, in his closing address to the jury, stated that "defendant had gone to the Indian Territory, where all rascals go." The evidence showed that after the assault upon Wm. Webb the defendant went, fled, to the Indian Territory. Defendant, in his own testimony, states that he went there. The additional words, "where all rascals go," whether true or false, could certainly have had no effect upon the jury.

He also referred to defendant's physical strength, stating that he was a strong, robust man, and one whom very few men would like to come in contact with in a personal encounter. It was wholly immaterial whether he was a strong, robust man, whom few would like to encounter or not. He was charged with shooting at Wm. Webb, and whether a weak or a strong man, was a matter of no consequence.

Mr. Bassett also said he "believed defendant guilty." I suppose no attorney ever made an argument to a jury, in such a case, without expressing his belief of the guilt or innocence of the accused on the facts. Other equally trivial statements made by the attorney in his closing address to the jury are complained of, but they are of the same character as the above.

The only additional remarks made by the attorney, which we shall particularly notice, was the following: "Judge Boxley has said that defendant is a good man, and why did'nt they (the prosecution) show he was a bad man? Now, gentlemen, why did'nt they prove his good character? When I defend a criminal, if he can prove a good character, the jury always gets the benefit of it. The State could not prove his bad character until defendant attempted to prove his good character. Mr. Boxley ought to have been lawyer enough to know this. We were ready to go into this matter, and the very fact that they did not attempt to prove him to be a man of good character, is a significant fact. Gentlemen, criminal lawyers always do this; they all understand it." Mr. Boxley, by his remarks, opened

the door for these observations by the attorney prosecuting for the State, and they were a legitimate answer to his ill-timed and unwarranted statement.

After the case was given to the jury, one of them asked the deputy sheriff, who had charge of them, if they could find a verdict and the court fix the punishment. The deputy sheriff made no reply. The juror asked him to see the judge and ascertain, but he did not see the judge, and nothing further on the subject passed between him and that or any other juror. It further appears, by affidavit filed on motion for a new trial, that the prosecuting attorney was examining and inquiring as to the law on that point. He had learned from the deputy sheriff that the jury desired information on the subject, but told no one else, and it seems that this is all that occurred. While it is improper for jurors to hold conversations with any one except the court, in open court, in regard to a cause submitted to them, this court will not reverse a judgment when all the facts with respect to the alleged impropriety are before the court and it is manifest that it could not possibly have prejudiced the defendant. It was improper for the juror to ask the bailiff any questions as to the law of the case, and while he acted within the line of his duty in refusing to answer the question, he should have been equally careful not to communicate what passed between him and the juror to the prosecuting attorney or any one else. If the jury had any doubt about the law of the case, if they desired additional instructions, they should have repaired in a body to the court room, and while court was in session, and made it known to the court. The alleged misconduct of the juror and the bailiff could not possibly have prejudiced the accused, and is no ground for reversing the judgment.

3. ——: conduct of jurors and bailiff in charge of jury.

Another ruling of the court which is complained of was the exclusion of the deposition of George Ireland. His testimony was in relation to a threat made by Hiram Webb, against the life of the

4. ——: evidence of threats.

defendant. The assault for which the defendant was indicted was made upon Wm. Webb, the father of Hiram. Hiram was not present at that difficulty, and no threats made by him could possibly throw any light upon the assault made by defendant upon Wm. Webb. But it is contended that a conspiracy was proved between old man Webb and his sons against defendant. No such evidence is to be found in the record. Stark had beaten Wm. Webb, and he and his sons naturally felt indignant toward Stark, and each of them, at different times, may have threatened him, but no evidence of any concert or conspiracy between them to do him harm was shown. Any threats made by Wm. Webb may have been admissible, as tending to show who was probably the aggressor, he or Stark, but threats made by Hiram Webb stand upon the same ground as if made by a stranger.

In the *State v. Ball*, 27 Mo. 324, it was held that on a conviction for an offense not capital, omission to enter of record the allocution or formal address of the judge to the prisoner, asking him if he has any thing to say why sentence should not be pronounced against him, is not an error for which the judgment should be reversed.

5. ——: allocution of the judge in cases not capital.

The judgment is affirmed. All concur.

THE STATE *ex rel.* THE ATTORNEY GENERAL v. FRANCE.

1. **Missouri State Lottery, Construction of Contract for Conducting it**: WHAT WAS AN INTERFERENCE BY THE PUBLIC AUTHORITIES WITHIN ITS MEANING. A contract for carrying on a lottery known as the Missouri State Lottery any where within the limits of the State stipulated that, in the event of any interference by the legislature, judiciary or any other power, so that the parties of the second part could not conduct the business, their obligation to make certain payments called for by the contract should cease. *Quo Warranto* proceedings were subsequently instituted against the conductors of the lottery, in which the circuit court decided that the

business was carried on in violation of law and awarded a judgment of ouster. From this judgment an appeal was taken, an appeal bond was given, superseding the judgment, and the judgment remained unenforced, and was finally reversed by the Supreme Court. Pending the appeal, the police of the city of St. Louis, with force and arms, arrested the persons engaged in the business in that city, and destroyed the property and appliances used by them in the business, in consequence of which they desisted from it. *Held*, that the judgment of ouster rendered by the circuit court and the acts of the police were not such interferences as released the payments called for by the contract. Nothing was an interference within the meaning of the contract unless it was done by some legally constituted power acting within the scope of duties assigned to it, and was of such a character as to have the legal effect of preventing the conduct of the business. The judgment having been superseded by the appeal bond, and finally reversed, never took effect; and the acts of the police were mere trespasses; *Held*, also, that as the right acquired by the contract to operate a lottery was co-extensive with the State, the acts of the authorities of a single municipality did not constitute such interference as was intended by the contract.

2. **Expiration of Lottery Franchise.** Where a franchise was granted for a lottery to continue until the sum of $15,000 should be raised, and it appeared that, by the terms of a contract made pursuant to the grant, that sum was due to the beneficiary from the party who had undertaken to conduct the lottery, and there was no evidence that the latter was insolvent; *Held*, that whether the whole of the money was actually paid or not, the franchise had expired, and the beneficiary had no power to continue it in force by making a new contract for raising any part of the $15,000, that might be unpaid under the first contract.

Quo Warranto.

OUSTER AWARDED

E. T. Farrish for relator.

Wm. O. Bateman, *Chester H. Krum* and *Jas. O. Broadhead* for respondents.

NORTON, J.—This is an original proceeding by *quo warranto* at the relation of the attorney general, the information alleging that since the 1st day of January, 1878, the

defendants have been exercising and using, without lawful authority, a lottery franchise, known as the Missouri State Lottery, after said franchise had expired and lapsed in law and fact. Judgment of ouster is prayed.

The defendants, in their answer and return, assert their right to exercise the franchise they are charged with usurping, in virtue of a contract made in 1842, as modified and amended in 1849, by and between the trustees of the town of New Franklin and one Gregory, which said contract had been transferred to them through assignments, made by the representatives of said Gregory; that said contract conferred upon them the right to exercise the said lottery franchise till the 1st day of January, 1878; that this right had been interfered with, and by reason of a judgment of ouster rendered on the 22nd day of December, 1875, by the circuit court of St. Louis county, in a *quo warranto* proceeding instituted by the State against Murray, Miller & Co., the then owners of the franchise, they were prevented from exercising the same from that time till the 4th day of March, 1878, when the said judgment was reversed by this court; that they were thus interrupted and denied the right of pursuing the said lottery business for more than two years of the time allotted to them in said contract. The answer further avers that on the 14th day of December, 1878, the trustees of the town of New Franklin made a further contract with said Murray, Miller & Co., the assignees and successors of the said Gregory, by which it was agreed that in further consideration of the sum of $100 then paid, and which was to be considered as payment number one under said amended contract, the annual installments should continue as follows: On the 1st day of January, 1879, $100, on the 2nd day of January, 1880, $100, and so on in annual installments of $100 each until the sum of $13,400, as provided for in the contract of April 11th, 1849, should be fully raised, making the sum of $15,000 as provided for in the acts of the legislature and the contracts thereunder. It is further averred that neither

said Murray, Miller & Co., nor defendants, ever abandoned said lottery franchise or their rights or privileges under the laws and contracts relating thereto; that neither of the steps provided in said contract of 1842 for the termination of said contract by the act of said parties, was ever taken by either of the parties; that is to say, neither the notice declaring said contract null and void was ever given by said trustees, nor did said Murray, Miller & Co., or defendants, ever give to said trustees the ninety days notice provided in said contract as a condition precedent to the abandonment thereof by said Gregory or his assigns.

The plaintiff, in effect, demurs to defendants' answer by filing her motion for judgment notwithstanding what is therein set up.

The contract relied upon by defendants as a justification, entered into by and between the trustees of the town of New Franklin and the said Gregory in 1842, as modified in 1849, by virtue of authority conferred upon said trustees by an act of the general assembly passed in 1833, and amended in 1839, 1855 and 1870, has been heretofore before this court for adjudication in the cases of the *State v. Morrow*, 26 Mo. 141; *State v. Miller*, 50 Mo. 132; *State ex rel. v. Miller*, 66 Mo. 340, in all of which two distinct questions were made; the first of which was whether the trustees of said town were authorized by an act of the legislature to make the Gregory contract, and the second was, if they did have such power whether the right which was vested in Gregory under a contract made in the exercise of such power to conduct and manage a lottery could be taken away or in any manner impaired by legislative enactment. All of the said cases answer the first question in the affirmative, and the second in the negative.

Notwithstanding it was held in the last of the above cited cases that the right of Gregory and his assignees under the said contract expired according to its terms in 1877, and notwithstanding the admission made in the answer that by the terms thereof it expired on the 1st day of Jan-

uary, 1878, it is earnestly claimed by counsel that the right of defendants to exercise the privilege of selling lottery tickets should be continued for an additional length of time after the 1st day of January, 1878, equal to the time their business is alleged to have been suppressed by reason of the judgments of ouster and interference of the police of the city of St. Louis, set up in the answer, which suspension lasted from the 22nd day of December, 1875, to March 4th, 1878. The question thus presented as to whether or not the said interference as set up had the effect claimed by counsel, cannot possibly be solved without a construction of the following clause contained in the Gregory contract, viz: "And the respective parties further agree that the party of the second part (Gregory) shall not be bound by this agreement in the event of any interference by the legislature, judiciary or any other power, so that he cannot conduct the business, in which case payment is to be made by him to the time of such interference only." It is contended on behalf of the State that the said contract by virtue of the above clause was terminated as soon as such interference as is therein mentioned occurred, and that upon its occurrence both parties were absolved from all obligations and rights created by it. It it contended, on the other hand, that such interference of itself neither abrogates, annuls nor cancels the contract, but is merely recognized as an occurrence which would authorize Gregory or his assignee to abandon it, and that this is left to the option of defendants, and until the exercise of such option the contract remains in force.

Unless it appears from the averments made in the answer that the interference was such an one as is mentioned in the above clause of the contract, it is wholly immaterial which of the above antagonistic views is correct, since before an interference can have the effect of either annulling the contract the moment it occurs or annulling it only after such occurrence, and after an exercise of an option by defendants to abandon it, it must fall within the class of in-

terferences alluded to in the said clause. The interferences therein referred to only include such as shall be made either by the legislature, the judiciary, or any other power, which we understand to mean any legally constituted power acting within the scope of duties assigned it. It is not sufficient that it should be simply an interference, nor is it sufficient that it be made by the legislature, judiciary or other power; but when so made it must be of such a character as to have the legal effect of preventing defendants from conducting the lottery business, before exemption in any view can be claimed by them from the obligations imposed by the contract. It follows from what has been said, that unless the interference set up in defendants' answer had the effect in law of suspending the said business of defendants and preventing them from conducting it, the contract of 1842, as modified in 1849, continued in full force in all its parts, and the obligation of defendants to pay the semi-annual installments mentioned therein was neither discharged nor the right of the trustees of the town of New Franklin to recover the said sums, if not paid, in anywise impaired.

The question then arises, was the judgment of ouster rendered in the case of the *State v. Miller*, *supra*, such an interference by the judiciary as prevented defendants from carrying on their business? We think it was not, and for the following reasons: Said judgment was rendered by the circuit court of St. Louis county on the 22nd day of December, 1875, from which defendants prosecuted an appeal to the St. Louis court of appeals, and also from that court to this. Defendants upon taking said appeal executed a bond which operated as a supersedeas of the judgment appealed from, and suspended all action u
the pendency of such appeal. That the appeal did operate as a supersedeas was expressly held by this court on a motion made by defendants in the case for a supersedeas. The court made the following ruling on said motion: "The court having fully heard and considered the appel-

lants' motion for a supersedeas herein, and being of opinion that an order of supersedeas is not necessary, as this is a civil case, and that the bond already filed by the appellants and approved by the court below acts as a supersedeas, doth order that the motion be overruled." It is, therefore, manifest that the said judgment of ouster, if an interference by the judiciary, was not such an interference as prevented defendants from "conducting their business," for said judgment was not executed, and could not be executed during the pendency of the appeal. It is nowhere in the answer averred that the said judgment was ever executed or that defendants were in fact ousted by it.

The only other interference set up in the answer is, that after the rendition of said judgment the police force of the city of St. Louis did with force and arms arrest the agents of defendants and seize and destroy the property and appliances of defendants used in carrying on their business, whereby they were prevented from running a lottery and from doing business under said contract. This is clearly not such an interference as was provided against in the lottery contract. It is not averred in the answer that the said police force was charged with the execution of said judgment of ouster, or that they were executing it, while engaged in doing the wrongful acts imputed to them in the answer. The averments made tend to show an aggravated case of trespass on the part of those persons directly participating in the commission of said wrongful acts, but they do not show any such interference as is contemplated by the contract any more than if the answer had alleged that the acts done and charged had been committed by a mob, instead of the police, or any more than if it had alleged that the property and appliances used by defendants in said pursuits had been burned by an incendiary or stolen by a thief, whereby their business was suspended, and they had thus been disabled from running a lottery.

Besides this the right of Gregory and his assignees under the contract to run a lottery was co-extensive with

the limits of the State, and was not confined to the limits of the city of St. Louis, and any interference by a municipal force preventing defendants from doing business in a particular locality is not such an interference as the contract provides for, to authorize an annulment of the contract, either upon its occurrence or its abandonment by an exercise of an option on defendants' part to abandon it.

It follows from what has been said that, notwithstanding the interference set up in the answer, the obligation of defendants to pay the semi-annual installments agreed to be paid until the full sum of $15.000, as provided for in said contract, was paid, remained in force, and that the right of the trustees of the town of New Franklin to receive such installments and enforce their payment has never ceased to exist, and as the said installments agreed to be paid amounted on the 1st day of January, 1878, to the full sum which the trustees were authorized to receive under the act of 1833, and as the said trustees, under the terms of the contract, if they have been complied with by defendants, have received said sum, and if they have not been complied with, the said trustees have a right to enforce the payment of so much as remains unpaid; that the contract, having been thus executed, the right of defendants to conduct a lottery under it terminated at the above named time, and the trustees of the town of New Franklin had no warrant in law to make any further contract in regard thereto, because in legal contemplation the sum of $15,000, the amount for raising which they had been authorized to contract for running a lottery, has been realized, it not appearing that defendants are insolvent, and that the unpaid balance due under said contract (if there is any such) cannot be collected from them. It also follows from what has been said that defendants cannot justify themselves in conducting said lottery on or after the 1st day of January, 1878, by reason of the contract set up in the answer, made on the 14th day of December, 1878, by the trustees of

the town of New Franklin, by which it was agreed that in consideration of $100 then paid, and the further sum of $100 to be paid on the 1st day of January, 1879, and the like sum of $100 to be paid each year thereafter, they should have the right to continue the lottery until the full sum of $13,400 had been received as provided in the contract of 1849.

It may, however, be observed in regard to this contract, that the object of the legislature as expressed in the act of 1833 in authorizing the trustees of the town of New Franklin to raise $15,000 by contracting for carrying on a lottery, was to enable said trustees to build a railroad from said town to the Missouri river. By an act amendatory thereof passed in 1839 they were authorized to use said fund in building a macadamized road instead of a railroad, and by another amendatory act in 1855 they were authorized to use the fund in building a plank road instead of a railroad or macadamized road, and by another amendatory act, passed in 1870, they were authorized to build a macadamized road instead of a railroad or plank road, which they were to commence in two months, and complete in eight months after the passage of the act. Such being the object of the bounty bestowed by the legislature upon the town of New Franklin, the trustees of said town should have availed themselves of it, by resorting to their action against the assignees of Gregory for any unpaid balance of the $15,000 due under the contract of 1849, instead of attempting to thwart the purposes of the general assembly by surrendering such right, and entering into a contract which indicates upon its face that it is in fraud of the above enactments, violative of their spirit, and intended more for the purpose of providing for the continuing and running a lottery than of raising money to build a macadamized road, which the law of 1870 authorizing its construction required to be commenced in two and finished in eight months after the passage thereof.

The contract of 1849 having been fully executed, and

the right of defendants acquired thereunder to conduct a lottery having expired according to its terms, on the 1st day of January, 1878, became *functus officio* and left nothing to amend by, and the amended contract of December, 1879, relied upon by defendants as a justification, cannot be attached to it so as to infuse life into it. Nor has such contract any original force for the reason, if for no other, that the said trustees having acquired the right to the full sum of $15,000 which they were authorized to raise by contracting for running a lottery, their power to make any further contract ceased.

The motion of plaintiff for judgment according to the prayer of the complaint, is hereby sustained, and judgment of ouster is hereby awarded; in which all concur, except NAPTON, J., not sitting.

BELL v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

1. **Instruction.** When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskillfulness on the part of defendant raised either by the petition or the plaintiff's evidence, the plaintiff is not entitled to an instruction as to the effect of unskillfulness on the part of defendant.

2. **Negligence, when a Question of Fact, when of Law.** Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court; where they are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts.

3. **Railroad:** SIGNALS AT PUBLIC CROSSINGS. The requirement of section 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway.

The statute does not require that these warnings shall be con-

tinued until the train has passed the crossing, but only until the engine has passed.

4. ———: MAN ON THE TRACK: ENGINEER'S DUTY. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business.

In this instance the engineer applied the air brakes to the train, but did not attempt to reverse the engine.

5. ———: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. The mere fact that a train was moving at a dangerous rate of speed, will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence.

Appeal from Linn Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

Geo. W. Easley for appellant.

Louis Houck for respondent.

NAPTON, J.—This was a suit to recover damages under the 2nd section of the damage act, based on the allegation that the plaintiff's son, Athen Bell, was killed by the negligence of the defendant's agents, in running a train through the town of Meadville, at an improper rate of speed and without giving timely notice of its approach.

It seems that Athen Bell, who was past fifteen years old, and well grown for his age, had, at the request of his father, who had recently moved from Saline county into that neighborhood, gone to Meadville to procure some corn, and that about two o'clock in the afternoon, when the fast passenger train of defendant from the east was due, he stood upon the main track between the rails looking at an engine attached to a freight train which was on the switch

south of the main road, waiting for the fast train to pass, which did not stop at Meadville. His attention seems to have been absorbed by this locomotive. At all events he seems not to have heard the station signals which were given at the usual place east of town, and about a half mile from the depot; nor did he pay any attention to the alarm whistle which the engineer had sounded, as soon as he saw the boy on the track. The boy was west of the street or road which crossed the railroad, from forty to sixty feet. How far the boy was from the train, when the engineer discovered him on the the track, is not certainly fixed by the testimony, not less however than 200 yards. The train could have been seen for six or seven hundred feet. The alarm whistle was kept continuously blowing and also the bell was rung, according to some witnesses. When the engineer discovered that the boy did not move, he put on the brakes, but it seems that it was too late to save the life of young Bell.

The following were the instructions in the case given at the instance of the plaintiffs:

1. It stands admitted by the pleadings in this cause that on the 11th day of May, 1875, on the track or line of the Hannibal & St. Joseph Railroad, in the town of Meadville, in Linn county, Athen Bell, the son of the plaintiffs, was struck and killed by a locomotive engine attached to a train of cars, run and operated on defendant's said railroad by its agents, servants and employees.

2. If the jury believe from the evidence that the plaintiffs, John A. Bell and Eliza J. Bell, are husband and wife, and the parents of Athen Bell, who was killed on defendant's railroad at the time and place stated in the petition, and that said Athen Bell was, when so killed, a minor and unmarried, then the jury should find their verdict for the plaintiffs; provided they further believe from the evidence that said Athen Bell died from an injury resulting from or occasioned by the negligence or unskillfulness of any agent or employee of the defendant whilst running,

conducting or managing the locomotive engine and train which ran upon, struck and killed said Athen Bell.

3. It is the duty of those in charge of a locomotive and train of cars in approaching the crossings of the public streets to commence ringing the bell or sounding the steam whistle at the distance of eighty rods therefrom, and to keep ringing the bell continuously or sounding the steam whistle at intervals until the train shall have passed over such public street, and if the jury believe from the evidence that, in this case, as the train approached and passed over a public street in the town of Meadville, the person in charge thereof did not ring the bell or blow the whistle as above required, and that the boy, Athen Bell, was struck by the locomotive and killed by reason of said omission and without fault on his part, then the jury will find their verdict for the plaintiffs.

4. Railroad companies and those operating and running their trains should exercise greater care and caution at points where their road passes through populous towns and villages than would be necessary in districts not so thickly populated.

5. Railroad companies, owing to the dangerous character of the vehicles and machinery which they operate, are held to the greatest care, caution and skill in the management of their business.

6. Notwithstanding the jury may believe from the evidence that the said Athen Bell was improperly on the track of defendant's railroad, and that it was negligence on his part to have been there at that time; yet if the jury further find from the evidence that the servants and employees in charge of the engine and train mentioned in the petition were negligent in running and managing the same, and that such negligence and improper management of said engine and train were the direct and immediate cause of the death of said Athen Bell, then the jury are bound to find for the plaintiffs.

7. Although the jury may believe from the evidence

that the boy was improperly on the track, and that he may have been negligent in standing thereon; yet if the jury believe that those in charge of the train could, by the proper observance of their duties and by ordinary care, prudence and caution in their business, have slacked up the speed of the train, by any means in their power, so as to prevent his killing, and that they failed so to do, then the persons in charge of the train were guilty of negligence for which the defendant is responsible.

8. While railroad companies are not limited by law as to rate of speed, yet whether the rate of speed in any particular case is excessive or dangerous, is a question for the jury, to be determined by them in view of the time, place and circumstances, and if in this case the jury believe that the rate of speed at which the train was approaching the town of Meadville, and at the time the boy was struck, was excessive or dangerous at that time and place, then those in charge of it were guilty of negligence in so running it.

9. In making up their minds whether the rate of speed at which the train was running at the time the boy was struck and killed was dangerous, the jury may take into consideration the time, place and all the surrounding facts and circumstances detailed in evidence.

The defendant then prayed the court to give the following instructions to the jury:

1. The burden of proof is on the plaintiffs to show every material fact going to make up the issues, and unless they have proven by a preponderance of evidence to the satisfaction of the jury that young Bell was killed by the carelessness and negligence of defendant, and without his contributing proximately thereto, they must find for defendant.

2. If the jury believe that deceased was killed by reason of his own negligence and not by the negligence of defendant, then they must find for the defendant, although they may believe that at the time the train struck him it

was running at the rate of twenty-five miles per hour or faster.

3. Although the jury may believe that in some regards the defendant was negligent, yet if they further believe from the evidence that deceased, by the exercise of ordinary prudence and caution, could have avoided the accident, they must find for the defendant.

4. If the jury believe from the evidence that there is a curve in defendant's road just east of the depot at Meadville which prevented the engineer of the engine drawing the train in question from seeing Athen Bell upon the main track of said road between the crossing and said depot until such engineer was within 200 or 300 yards of said depot; that, owing to the grade on said road between said points, said engineer could not stop said engine and train after seeing said Athen Bell, so as to prevent striking and killing him; that said engineer sounded the alarm whistle on said engine as soon as he discovered said Bell to be upon said track, and kept sounding it so long as there was any chance of warning said Bell of the approach of said engine and train, they will find for the defendant, notwithstanding they may further believe from the evidence that said train was running at a speed of twenty-five miles an hour or faster.

5. If the jury believe from the evidence that the engineer of the engine drawing the train in question could not see Athen Bell, the deceased, until within from 200 to 300 yards of him, and that owing to the grade he could not stop his train after so seeing said Bell, so as to prevent striking and killing him, they will find for the defendant, provided they shall further believe from the evidence that said engineer sounded the alarm whistle as soon as he discovered said Bell to be upon the main track of defendant's road and kept sounding it so long as there was any chance of warning said Bell of the approach of said engine and train.

6. Although the jury may believe that the train which

struck young Bell was running at the rate of twenty-five miles per hour or more, and that he was struck near the Meadville depot, and that the bell was not ringing, yet that will not excuse him from carelessly and negligently standing on the defendant's track at a time when a fast train was due, and if the jury believe his death resulted immediately from his imprudence in so standing on said track, and the accident could not have been avoided by defendant with proper care and prudence, the plaintiffs cannot recover.

7. If the jury believe from the evidence that Athen Bell, the deceased, was a person of sufficient size to be apparently capable of taking care of himself, the engineer of the engine which struck him had a right to presume that, upon due warning being given to said Athen Bell, he would leave the track and get out of the way of said engine.

8. If the jury believe from the evidence that defendant's train could have been seen by young Bell at the time of the accident a distance of 200 steps or more from the spot where he was struck by the engine, or that he could have heard it that or a greater distance had he exercised his senses of sight and hearing, notwithstanding which facts he remained on defendant's track and was struck and killed by the engine, such action on his part was negligence, and if the jury believe his death was caused proximately by such negligence, the plaintiffs cannot recover.

9. It is negligence and carelessness for a person to stand on the track of a railroad without keeping watch both ways for trains. And if the jury believe from the evidence that Athen Bell was standing on the defendant's track at the time the defendant's fast train was due, and that the agents of defendant in charge of said train exercised ordinary care and prudence in the management of said train, and did all they could to stop the train and avoid the accident at the time said Bell was struck, then they must find for defendant.

10. Although the jury may believe from the evidence that the defendant was negligent in running and operating its train which struck and killed Athen Bell, still the plaintiffs cannot recover unless the jury believe from the evidence that such negligence of defendant was greater than that of said Bell in standing on defendant's track at the approach of said train.

11. Although the jury may believe from the evidence that the engineer of the engine that struck Athen Bell did not reverse his engine, yet he had a right to presume that said Bell would get off the track on the approach of the engine, and if he, said engineer, acted upon his judgment and did what he judged was most likely to save the boy in applying the air brakes and sounding the danger signals, then his omission to reverse his engine was not negligence.

The court gave those numbered one, two, three, four, five, six, seven, eight, nine and ten, and refused to give that numbered eleven. To the refusal of the court to give that numbered eleven, the defendant at the time excepted.

The objections taken here to the second instruction, given for plaintiffs, we do not consider as tenable, except
1. INSTRUCTIONS. that the word "unskillfulness" should have been omitted, as there was no charge of that in the petition, and indeed no evidence touching the subject, on the side of the plaintiffs.

The principal objection is, that the instruction leaves the whole subject of negligence to the jury. According
2. NEGLIGENCE, WHEN A QUESTION OF FACT. WHEN OF LAW. to the prevalent practice here, the court that presides at the trial of a case gives instructions prepared by the attorneys on each side, which are usually drawn up in the shape of independent, separate propositions, and to ascertain the propriety of any single one, it must be considered in connection with the other instructions on each side. Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court. Where the facts

are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts. Mr. Wharton in his work on Negligence, observes: "The true position is this: Negligence (with the exception hereafter to be noted) is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of negligence would be set aside by the court, then it is the duty of the court to instruct the jury to negative negligence. In all other cases, the question is for the jury, subject to such advice as may be given by the court as to the force of the inferences. The only exception to this rule is that elsewhere discussed, where a statute declares that a party doing or omitting certain things is to be treated as negligent. In such cases all that the jury has to decide is whether the thing in question was done or omitted. If so, negligence is juridically imputed, and this must be declared by the court." Vol. 1, § 420. We see no substantial objection to the second instruction, when considered in connection with the other instructions given on each side.

3. RAILROAD: signals at public crossings.

The third instruction is also objected to on the ground that it had nothing to do with the case. We concur in this view, although its impropriety alone would scarcely justify a reversal. The statute which requires the bell to be rung or the whistle sounded was for the benefit of persons at the road crossing or approaching it; but the boy killed in this case was not on the road, or at the crossing, but forty or sixty feet west of it. Besides, the instruction mistakes the requirements of the act in declaring that the bell shall be rung or the whistle sounded until the train shall have passed over such street or road, whereas these warnings are only required to be continued until the locomotive passes, not the entire train. However, this instruction was harmless, and had really nothing to do with the case.

It may be observed in advance of an examination of the real point and only point involved in this case, that young Bell was guilty of the grossest negligence, beyond all dispute, a negligence difficult to be accounted for, assuming him to have been a young man of ordinary intelligence and without any defect of sight or hearing, and there was no proof that he was not. His father had recently moved into the neighborhood of Meadville, and he had never lived near to any railroad before, and the boy was, therefore, naturally not familiar with their detailed operations. Still he must have known, without any such familiarity, of the danger of standing on a railroad track and of the necessity of watching for the approach of a train. He must have known that a person in such a position, to be safe, must use his eyes and ears. His attention was absorbed by a locomotive of a freight train on the switch south of the main track. My conjecture is, that he believed that he was on a switch himself and that the main track was the one where he saw this train standing preparing to move. He must have heard the alarm whistle which was sounded repeatedly, at first at a distance of 600 feet, but as I conjecture, thought the approaching train was on the same track with the train before him. It is true he did not hear the man who hallooed to him to get off the track, to look out for the train, because the wind was blowing rather strong from the west or northwest, but the sharp whistle used to alarm cattle would be far more distinct and powerful than a human voice, and could scarcely have been unheard. He had time after the whistle was sounded to get off the track—he was near the south rail—and two steps would have placed him out of the reach of the cars.

4. ——: man on the track: engineer's duty.

Notwithstanding his negligence, the employees of the railroad company had no right to run over him, and the decisive question in the case was whether, after discovering the position of young Bell and that he had not moved at the sound of the alarm whistle, the engineer did every-

thing in his power to avoid a collision. This question is presented by the seventh instruction given for plaintiffs, and was also the point upon which the eleventh asked by defendant was refused. The seventh instruction was right, if the words "by any means in his power" had been qualified by adding: "consistent with the safety of the train." The eleventh instruction asked by defendant presents in plain terms the real point in the case. The evidence shows that everything was done by the engineer, when he ascertained that Athen Bell did not move at the alarm whistle, except to reverse the engine, and the question is, whether the engineer in simply applying the air-brakes, and not reversing the engine, is to be regarded as justified by the circumstances upon the ground that he acted on his judgment, which, whether right or wrong, had to be formed instantaneously. Upon this subject the engineer testified: "It would help to stop the engine to reverse the engine. I saw the boy, but did not reverse the engine." "There is danger of blowing off the cylinder head in reversing an engine. In cases of this kind I don't reverse the engine, according to my judgment. I whistled to save the boy. I could not whistle and reverse the engine at the same time; did not reverse the engine, so I kept on whistling; would have to quit whistling to reverse the engine; you have to use both hands in reversing an engine. The cab of an engine is six or seven feet wide; the bell cord is on the left hand side; it would not take very long to reverse an engine; it would take more than a second; the whistle lever is four or five feet from me; it is in the right hand corner; could not have reversed the engine with one hand; if you did not get the lever clear over it would make it worse; could have quit whistling and reversed and gone to whistling again; don't think we would have slackened up much if any more by reversing." If this engineer was a competent one, and the proof was that he was one of the best in the employment of defendant, and had been in the business ten years, and there was no contradictory testi-

mony, then it is clear that his judgment of what was best to be done must necessarily govern his action. This judgment had to be formed instantaneously, there was no time for deliberation, and, whether right or wrong, his action in accordance with it cannot be held negligence. The eleventh instruction asked by defendant should, we think, have been given, assuming, as in this case we are authorized to do, that he was a competent and careful engineer.

It is urged that this train was running at a dangerous rate of speed, through the town of Meadville, and that this of itself was negligence. The schedule time was twenty-five miles an hour, and Meadville was not a stopping point. That fact was known, doubtless, to every person in the village, and that it was four or five minutes behind time on the occasion of this unfortunate accident. There were various estimates of the speed of the train made by bystanders and passengers, which, of course, were of very little value. The engineer, however, admits that the train was running when it reached the outskirts of Meadville, at the rate of twenty-five or thirty miles an hour. The law has not fixed the rate of speed allowable, and conceding the speed in this case to have been unjustifiable, and that injury to persons and property under such circumstances would make the company responsible, yet it could only be when such persons were guilty of no negligence themselves, or such property was not negligently in the way. Had the plaintiffs' son been a boy of such tender years as to be incapable of taking care of himself, the question of the liability of the defendant on the sole ground of improper speed would have been properly presented, but nothing of this kind appears. The boy was in size and appearance a man, and he was taking a wagon to Meadville to procure a load of grain, and beyond all doubt his position on the track at the very time when the train was due, and when the spectators had gathered about the depot to witness the operation of the mail catcher, a recent invention by which a mail bag was transferred to a train in

5. ——: negligence: contributory negligence.

motion, was unaccountable negligence. It would seem natural that the boy, seeing the crowd of spectators not far east of him, should have made some inquiry as to the cause. That the train was due and did not stop, and was accustomed to a rate of speed between twenty and thirty miles an hour, if not known to him already, could have been readily ascertained. The managers of the train, however, could not be affected by such negligence or ignorance. The engineer had a right to assume, when the boy came in sight, that he would step off upon the sounding of the alarm whistle, and the only qestion in the case was, whether, upon seeing the boy's position on the track, and that he persisted in staying there after repeated and continuous alarms of the whistle, the engineer did use all the appliances in his power to prevent a collision, according to his best judgment. Judgment reversed and cause remanded. All concur.

SHERMAN v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

1. **Practice**. PROOF OF GUARDIANSHIP. The answer denying the plaintiff's right to sue as guardian, and no evidence having been offered of her appointment as such, so far as the record shows, the judgment in her favor is, for that reason, reversed.

2. **Railroad**: FREE RIDER ON FREIGHT TRAIN, TO BE REGARDED AS A PASSENGER, WHEN. It seems that a person riding on a freight train on which passengers are allowed to be carried, is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain.

3. **Master Liable for Torts of Servant, when.** It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the

knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured; *Held*, that the railroad company was not liable.

4. ———: EFFECT OF PLAINTIFF'S YOUTH ON THE RULE OF LIABILITY. The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants.

5. ———: INJURY TO PASSENGER ON FREIGHT CAR. If a passenger on a freight train is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company.

Appeal from Livingston Circuit Court.—HON. E. J. BROADDUS, Judge.

REVERSED.

Geo. W. Easley for appellant.

S. Turner for respondent.

HOUGH, J.—The petition in this case alleged the minority of the plaintiff and the appointment by the probate court of Livingston county of Ellen Sherman as his guardian. The appointment of the guardian is specifically denied in the answer and the record fails to show that any evidence was offered on that subject. Following the decision of this court in the case of *Porter v. The Hannibal & St. Joseph R. R. Co.*, 60 Mo. 160, the judgment must, for this cause, be reversed.

1. PRACTICE: proof of guardianship.

As the case must be retried, it will be proper to make some observations upon the law of the case as presented by the record now before us. The evidence taken at the trial is preserved in the bill of exceptions in the following form: The plaintiff introduced evidence tending to prove that the plaintiff got on a freight train of defendant at

Chillicothe, about October 6th, 1875, without the knowledge or consent of his parents; that he rode on said car some ten miles when he was discovered, being still in Livingston county, by a brakeman on said train, when he was told by the brakeman if he wanted to ride he must help brake, and placed him at a brake and instructed him in the signals when to brake and signal the engineer; and when he got to Cameron he was told if he wanted to ride to St. Joe he must help coal up; that the said brakeman permitted him to ride on said train, and not in the caboose car attached to the train for the purpose of carrying passengers, till the train arrived at Cameron, a point forty miles west of Chillicothe; that at Cameron the plaintiff, who was thirteen years and ten months old, and a bright, capable boy of his age, was directed by said brakeman to assist in coaling up the engine, which he did; that when it was coaled up, the brakeman told the boy to get on top of a certain freight car if he wanted to ride to St. Joseph, which he did; and while riding on top of said train, and about one mile from St. Joseph, and in Buchanan county, the brakeman, by signs, directed the plaintiff to adjust some boards on a car, which boards were falling off; that while plaintiff was in the act of so adjusting said boards, one of them striking on and against a post hit and threw plaintiff off the train, which was then in rapid motion, and broke his leg, seriously injuring him for life; that the conductor of said train knew plaintiff was on the train at Cameron and afterward to the time of the accident, but never spoke to him or gave him any directions in any way.

Defendant offered evidence tending to show that the conductor had exclusive control of the train and all persons on it; that plaintiff never paid any fare; that he secreted himself when he got on the train; that no employee of defendant had any authority from defendant to carry passengers unless they paid their fare, and never to permit any person to ride on any part of their train except in the

caboose attached to the train for the purpose of carrying passengers; that this train had a caboose attached; that all conductors and brakemen had been instructed never to carry any person without he paid his fare, and never to carry any person on a train other than in the caboose; that the brakeman had exclusive control of coaling up at Cameron.

It may be conceded that the plaintiff is to be regarded as a passenger at the time he was injured. The train being one on which passengers were allowed to be carried, although the plaintiff boarded the train without the permission or knowledge of the conductor, yet as the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare. *Wilton v. Middlesex R. R.*, 107 Mass. 108.

2. RAILROAD: free rider on freight train, to be regarded as a passenger, when.

It is plain, however, from the testimoy, which we have inserted at length, that the plaintiff was not injured simply by reason of his being carried as a passenger in a dangerous position, in violation of the rules of the company, but in consequence of the order of the brakeman to him to adjust some loose boards on one of the cars in the train, in the execution of which order he was thrown from the train and injured. This order of the brakeman was clearly the proximate cause of the injury. But for this order and the attempted execution of it, it does not appear that the plaintiff would have been injured, as the train seems to have gone through in safety. Whether the company is responsible for the consequence of the brakeman's request to the plaintiff to adjust the loose boards, is the sole question to be determined.

3. MASTER LIABLE FOR TORTS OF SERVANT, WHEN.

It is well settled that to make the master liable for the tortious act of his servant the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Here the testimony shows that the brakeman had no control whatever over any person on the train and no concern with them. The testimony is,

"that the conductor had exclusive control of the train and of all persons on it." The control assumed by the brakeman over the plaintiff, and his directions to him to render various services on the train, and especially the service in which he was injured, were wholly unwarranted and unauthorized, and the master cannot be held liable for the consequences of such acts. When an act done by a servant is within the scope of his employment, the master will be liable although the servant does not obey his orders as to the manner of its performance. But it was no part of the duty of the brakeman, so far as this record shows, to employ or to direct any person, much less a passenger, to perform any service on the train, and if without such authority he negligently led the plaintiff into danger, such negligence is his own and cannot be imputed to the master. Nor does it appear that the conductor was aware of the misconduct of the brakeman in this particular.

4. ——: effect of plaintiff's youth on the rule of liability.

The youth of the plaintiff, as was said by Agnew, J., in *Flower v. Railroad Co.*, 69 Pa. St. 216, (8 Am. Rep. 251,) "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or confer authority on one who has none." *Snyder v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 413; *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418.

If by reason of an accident to the train the plaintiff had been injured while simply riding on a freight car, the defendant would, on the record before us, be held liable, as it does not appear that the regulations of the company prohibiting passengers from riding elsewhere than in the caboose, were conspicuously posted as required by law. The statute on this subject is as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time, in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided, said company, at the

time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers." R. S., § 800; *Higgins v. Hannibal & St. Joseph R. R. Co.*, 36 Mo. 418. If the rules were properly posted, the mere acquiescence of the conductor in the plaintiff's remaining on one of the freight cars after he discovered plaintiff was on the train, would not render the company liable, unless, perhaps, the plaintiff could not read, and the conductor was aware of that fact, and had reason to believe that he was ignorant of the rules of the company. The judgment will be reversed and the cause remanded. All concur.

ST. LOUIS RAILROAD COMPANY v. SOUTH ST. LOUIS RAILROAD COMPANY, *Appellant.*

Street Railroads in St. Louis: PARALLEL LINES. Section 3 of the act of January 16th, 1860, (Acts 1860, p. 52,) whereby it was enacted that no street railway should be constructed in the city of St. Louis nearer to a parallel railway than the third parallel street, was not repealed by the act of February 15th, 1864, (Acts 1864, p. 446,) nor by the act of March 19th, 1866, (Acts 1865-6, p. 283, art. 4, § 1, clause 51,) nor by the act of March 13th, 1867, (Acts 1867, p. 62, art. 4, § 1,) nor by the act of March 4th, 1870, (Acts 1870, p. 463, art. 3, § 1, cl. 5, 9, 16, and art. 12, § 8,) nor by article 10, section 1 of the present charter of the city of St. Louis, (R. S. 1879, p. 1616). Neither has the municipal assembly of said city the power to repeal said section 3.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Louis Gottschalk, I. C. Terry, Broadhead, Slayback & Haeussler and *Irwin Z. Smith* for appellant.

Smith P. Galt and *Geo. A. Madill* for respondent.

HOUGH, J.—When the case of the St. Louis Railroad

Company against the Northwestern Railroad Company was before this court in 1878, (69 Mo. 65,) it was rather assumed than directly decided, that the act of January 16th, 1860, was still in force. The judgment of the court of appeals which was before us for review in that case, proceeded upon the theory that the act named had not been repealed, and the judgment of the circuit court was based upon the same view, and although the question of the repeal of the act of 1860 was presented by the record, it was not urged in the argument, and we did not, therefore, discuss the question in our opinion. We examined the matter, however, sufficiently to satisfy ourselves, at that time, that the act of 1860 had not been repealed, and in our opinion assumed that such was the fact. Of course the decision in that case could not have been rendered except upon the theory that the act of 1860 was still in force. This question has been elaborately argued in the case now before us, and we are asked for a direct adjudication as to that matter.

We will preface what we have to say upon this point by observing, first, that in our opinion the plaintiff in this case has a right to invoke the provisions of the act of 1860 if they are still in force as against the defendant; and, second, that the provisions of said act prohibiting the construction of parallel roads within three blocks of each other, were primarily intended as police regulations, incidentally affording a qualified exemption from competition to the roads coming within the scope of the act, but subject to repeal or modification, whenever, in the opinion of the legislature, the public necessities should demand it.

It is contended by the defendant that the act of 1860 was repealed by the act of February 15th, 1864, and that it is also in conflict with the charter of the city of St. Louis passed March 19th, 1866, the charter passed March 13th, 1867, the charter passed March 4th, 1870, and the present charter of said city.

The section of the act of February 15th, 1864, relied

on by the defendant as repealing the act of 1860, is as follows: "That the city council of the city of St. Louis shall have full power, with the approval of the mayor, to determine all questions arising with reference to street railroads in the corporate limits of said city, whether such questions may involve the incorporation of companies to construct such street railroads, granting the right of way or regulating and controlling any such railroads after their completion." This section is a grant of legislative power and is in effect, though not in form, an amendment of the city charter. Conceding, as is claimed by the defendant, that this section delegated to the city council of St. Louis all the power over the subject of street railroads possessed by the legislature, and that it, therefore, authorized the city council to pass ordinances granting the right of way to street railroads in conflict with the provisions of the act of the legislature of January 16th, 1860, yet, until such ordinances were passed, it is perfectly obvious that the provisions of the act of 1860 remained in force. The grant of unrestricted legislative power to the city council over the whole subject of street railroads, could not of itself, repeal the act of 1860. The power of repeal was at most, simply granted to the city council, and until such power was exercised by that body, the statute remained unaffected by the grant. The bare statement of this proposition is sufficient to demonstrate its truth. Now the right claimed by the defendant to construct a parallel road within three blocks of the plaintiff's road is under an ordinance passed by the municipal assembly of the city of St. Louis on July 16th, 1878. By reference to the revised charter of the city of St. Louis passed March 19th, 1866, it will be seen that the mayor and city council are given sole power and authority "by ordinance not inconsistent with any law of this State, * * to grant the right to any person or persons, corporation or company, to make and construct street railways in any street in said city, and to regulate and control the same and the use thereof," (Acts 1865–6 p.

283, art. 4, § 1, clause 51,) and all acts and parts of acts contrary to, and inconsistent with, the provisions of this act, are in terms repealed. This act is in direct conflict with the act of 1864, as construed by the defendant, and necessarily repeals it.

The act of 1864 confers power upon the city council to grant the right to construct street railways by ordinances in conflict with the act of 1860, whereas the charter of 1866 restricts the council to the passage of such ordinances only as are in harmony with the act of 1866, and repeals all laws previously passed in conflict with such charter. It it hardly necessary to make an argument to prove that a legislative grant to the city council of power to pass ordinances which shall have the effect of repealing an act of the legislature, is irreconcilably inconsistent with a legislative declaration that no ordinance shall be passed which shall conflict with any act of the legislature. Nor is the power conferred upon the city council by the charter of 1866, totally irreconcilable with the restriction imposed, as in the case of the *State v. Clarke*, 54 Mo. 17. The unrestricted power of the city council over the subject of street railroads which, it is claimed, was conferred by the act of 1864, having thus been extinguished, has never since been revived.

The city charter of 1867 contains the same requirement, that the ordinances passed in regard to street railroads shall not be inconsistent with any law of the State. Acts 1867, p. 62, art. 4, § 1. A similar provision is also to be found in the charter of 1870, (Acts 1870, p. 463, art. 3, § 1, and art. 12, § 8,) and in the amendment of 1874, (Acts 1874, p. 363, § 1).

The charter now in force in the city of St. Louis, under which the ordinance authorizing the defendant to build its road was passed, was framed and adopted in pursuance of the provisions of section 20, article 9 of the constitution of 1875, and vests the legislative power of the city in two houses, styled the municipal assembly of St. Louis. This

charter superseded the former charter of the city and all amendments thereof, and was, by the constitution, required to be in harmony with the laws of the State. This charter, like those previously noticed, confers upon the municipal assembly the sole power and authority to grant to persons or corporations the right to construct street railways in the city, by ordinances not inconsistent with any law of the State. Indeed the entire grant of legislative power is subject to this condition. Art. 3, § 26. Article 10 of this charter provides that: "The municipal assembly shall have power by ordinance to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after completion," etc. The power here conferred is to be exercised, of course, by such ordinances as the municipal assembly is competent to pass; that is, ordinances not inconsistent with the laws of the State. Article 10 is but a detailed amplification of the power conferred by the 11th clause of section 26, article 3, besides being somewhat legislative in its character. It follows from the foregoing views that the municipal assembly had no power to disregard the regulations prescribed in the act of January 16th, 1860.

It is unnecessary to consider in detail the various acts of the legislature authorizing the construction of certain street railroads in the city of St. Louis, within the prohibited distance prescribed by the act of 1860. The only effect of these acts, according to the well established rules for the construction of statutes, was to dispense with the restrictions contained in the 3rd section of the act of 1860, so far as the companies named in these act were concerned. As to all other companies, its provisions remain in full force.

Our opinion is, that the act of January 16th, 1860, has never been repealed, that the municipal assembly of St.

Louis has no power to repeal it, and that the legislature alone can repeal it. While it remains in force the plaintiff is entitled to the benefit of it, and it is our duty to enforce it. The judgment of the court of appeals is affirmed. All the judges concur.